Supreme Court, U.S.
FILED
SEP 30 1998
CLERK

No. 98-392

In The

Supreme Court of the United States

October Term, 1997

MICHAEL W. WALKER, AEARTH DEVELOPMENT, INC., AEARTH PREPARATIONS, INC., AND COAL PROCESSORS, AN ARKANSAS JOINT VENTURE,

Petitioners,

v.

FIRST COMMERCIAL BANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

First Commercial Bank, N.A. is a party to this proceeding. First Commercial Bank, N.A. is a publicly held corporation.

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STATEMENT OF THE CASE

Arkansas has never merged its law courts and its equity courts, which remain separate courts with distinct areas of subject matter jurisdiction. In Arkansas, the courts of law with original jurisdiction are called circuit courts; the courts of equity with original jurisdiction are called chancery courts. The Supreme Court of Arkansas has appellate jurisdiction over both types of courts.

This case was commenced in circuit court. First Commercial Bank raised the defenses of set-off and recoupment and moved to transfer the case to chancery court on the ground that these are equitable defenses. The motion was granted. The case was tried to the chancellor, who held, over First Commercial Bank's objection, that Michael Walker had standing and the corporate entities, Aearth Development, Inc., and Coal Processors, had capacity to sue.[1] After a six week trial, the chancellor ruled in favor of First Commercial Bank on the merits of the case.

The Aearth parties appealed. First Commercial Bank cross-appealed on the issues of Walker's standing and the capacity of the corporate entities to sue. The Supreme Court of Arkansas reversed on direct appeal on the ground that the chancery court lacked subject matter jurisdiction. Since the chancery court lacked subject matter jurisdiction, the Supreme Court of Arkansas did not reach the issues of standing and capacity raised on cross-appeal. The opinion stated, "The Court need not address

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[1] Hereafter, we will refer to the petitioners collectively as "the Aearth parties."

any other issues in view of the ruling on this dispositive issue." *Walker v. First Commercial Bank, N.A.*, 317 Ark. 617, 619, 880 S.W.2d 316, 318 (1994). *See* Petition for Writ of Certiorari, Appendix D, p. 28a.

After remand, the case was transferred to circuit court and tried to a jury, which returned a verdict against First Commercial Bank. First Commercial Bank appealed to the Supreme Court of Arkansas and asserted, *inter alia*, that Walker lacked standing and the corporate entities, Aearth Development, Inc. and Coal Processors, lacked capacity to sue.[2] The Aearth parties responded that the Supreme Court of Arkansas had decided these issues in the first appeal, and that First Commercial Bank had waived these issues at trial. The Supreme Court of Arkansas held that it had not decided these issues in the first appeal, and that First Commercial Bank had not waived them. *First Commercial Bank, N.A. v. Walker*, 333 Ark. 100, 107-8, 969 S.W.2d 146 (1998). *See* Petition for Writ of Certiorari, Appendix A, p. 7a. The Supreme Court of Arkansas then held under Arkansas law that Walker lacked standing and that the corporate entities lacked capacity to sue. The Supreme Court of Arkansas decided no issue of federal law, nor was any issue of federal law presented to it. State law provided the entire basis for the opinion that the petitioner asks this Court to review. The Aearth parties seek review of the decision of the Supreme Court of Arkansas on the issue of whether the corporate entities, Aearth Development, Inc., and Coal Processors,

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[2] Aearth Preparations, Inc., was dismissed at trial and did not appeal the dismissal.

have capacity to sue under Arkansas law. No issue regarding Walker's standing is presented in the petition.

REASONS FOR DENYING THE WRIT

1. The Federal Question Sought to be Reviewed Was Waived Below.

First Commercial Bank was the appellant in this appeal before the Supreme Court of Arkansas and asserted in its opening brief that Aearth Development, Inc. and Coal Processors lacked capacity to sue under Arkansas law. In the appellees' brief filed in the Supreme Court of Arkansas, the Aearth parties argued that the Supreme Court of Arkansas had ruled on the capacity issue in the prior appeal, so the determination in the prior appeal was the law of the case; and that First Commercial Bank had waived the issue below. The Aearth parties did not argue that the automatic stay provision of the federal bankruptcy code precluded the court from finding, under Arkansas law, that Aearth Development, Inc. and Coal Processors lacked capacity or standing, nor did the Aearth parties raise any other federal question in their brief.

The case was argued orally before the Supreme Court of Arkansas. During that oral argument, counsel addressed the issue of whether the Aearth parties had capacity to sue. However, counsel for the Aearth parties did not mention the automatic stay in the oral argument, nor did he raise any other federal question at oral argument.

The Supreme Court of Arkansas issued an opinion holding, under Arkansas law, that Walker lacked standing and that Aearth Development, Inc., and Coal Processors lacked capacity to sue. The Supreme Court of Arkansas rejected the argument that the issues of standing and capacity had been decided in the first appeal and rejected the argument that First Commercial Bank had waived these points below. The Supreme Court of Arkansas addressed every argument made by the Aearth parties in their brief and in oral argument. The Supreme Court of Arkansas did not address the applicability of the automatic stay because that issue had not been raised by the Aearth parties at the time the decision was rendered.

After the Supreme Court of Arkansas decided that Aearth Development, Inc. and Coal Processors lacked capacity to sue under Arkansas law, the Aearth parties asserted, for the first time in the appeal from the judgment on the jury verdict, that the automatic stay of the federal bankruptcy code applies to this case. Since the issue was raised for the first time in this appeal in the petition for rehearing, the issue was waived. It was not considered by the Supreme Court of Arkansas. *Cf. Arkansas State Highway Commission v. Coffelt*, 257 Ark. 770, 522 S.W.2d 839 (1975) (Issues raised for the first time in a petition for rehearing will not be considered.); *Sebastian County v. Educare Centers of Arkansas, Inc.*, 296 Ark. 538, 761 S.W.2d 884 (1988) (Issues raised for the first time in a petition for rehearing will not be considered.) The Supreme Court of Arkansas never addressed the applicability of the automatic stay because the issue was not raised prior to the petition for rehearing. The federal question the Aearth parties now seek to raise was never

properly presented to the state court, which never considered it. "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon v. State of Georgia*, 295 U.S. 441, 443, 55 S.Ct. 794, 795, 79 L.Ed. 1530 (1935). Here, the Aearth parties attempted to raise a federal question for the first time in a petition for rehearing. The Supreme Court of Arkansas did not entertain nor decide that question. That issue has been waived.

2. The Automatic Stay has No Application to this Case.

The second reason the Petition for Writ of Certiorari should be denied is that the petition raises an issue regarding the automatic stay provision of the federal bankruptcy code, but the automatic stay has no application to this case.

The automatic stay statute, 11 U.S.C. § 362 (a)(1), provides that a bankruptcy petition operates as a stay of "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced *before the commencement of the case* under this title, or to recover a claim against the debtor that arose *before the commencement of the case* under this title. . . . " [Emphasis added.] Aearth Development, Inc. was incorporated in November 1977.[3] The bankruptcy petitions of both Aearth Development, Inc. and Coal Processors were filed in November

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[3] Aearth Preparation, Inc., was incorporated in August 1981. It's charter was revoked on November 27, 1984. As noted

1982. The Aearth Development, Inc. corporate charter was revoked on November 16, 1984. It does not appear from the record that the franchise taxes were delinquent at the time the petition for bankruptcy was filed. No corporate franchise tax was listed as a debt or tax owed on the bankruptcy schedules. Apparently, the franchise taxes were first delinquent in November of 1983, which was after the petition for bankruptcy was filed. Thus, the revocation of the charter was for non-payment of franchise taxes that came due after the bankruptcy petition was filed. Hence, the action to revoke the corporate franchise was not one that could have been commenced "before the commencement of the case" nor was it to recover a claim against the debtor that arose "before the commencement of the case. . . . " Therefore, 11 U.S.C. § 362 has no application.

The case on point is *State of Missouri v. U.S. Bankruptcy Court for the E.D. Arkansas*, 647 F.2d 768 (8th Cir. 1981), where the Eighth Circuit noted that the bankruptcy court had recognized that the trustee was required to operate the warehouse "in accordance with the state law," including state laws requiring licensing of warehouses. 647 F.2d at 777. There, the trustee was ordered to acquire all necessary state licenses. *Id.* at 778. That a debtor in bankruptcy must comply with valid state laws, such as licensing laws, is required by 28 U.S.C. § 959 (b), which is the statute governing this case, not 11 U.S.C. § 362. Hence, the opinion of the Supreme Court of Arkansas is

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above, Aearth Preparation, Inc., was dismissed in the circuit court proceedings and did not appeal that dismissal.

consistent with the one case directly on point and with the controlling provision of the federal statutes.

CONCLUSION

The federal question sought to be reviewed was waived below. Moreover, this case presents no substantial federal question for review. The petition should be denied.

Respectfully submitted,

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